IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
STATESVILLE DIVISION
Civil Action No. 5:17-cv-00176

SWIFT BEEF COMPANY, Plaintiff, vs. ALEX LEE, INC., Defendant.	)	**MEMORANDUM OF LAW IN SUPPORT OF PARTIAL MOTION TO DISMISS**

Plaintiff/Counterclaim-Defendant Swift Beef Company ("Swift") states as follows in support of its Partial Motion to Dismiss three of five causes of action pleaded in Defendant/Counterclaim-Plaintiff Alex Lee, Inc.'s ("Alex Lee") Answer and Counterclaims ("Counterclaims") (ECF No. 26):

INTRODUCTION

Although Alex Lee attempts to allege five North Carolina state law causes of action against Swift, this dispute actually boils down to a disagreement between the parties relating to Swift's performance under a Purchase Agreement that the parties signed in April 2014. Specifically, on April 21, 2014, Swift entered into a contract with Alex Lee (the "Lease Agreement") to lease a meat further processing and packaging plant located in Lenoir, North Carolina, from Alex Lee (the "Lenoir Plant"). On that same day, the parties also entered a second contract relating to Alex Lee's agreement to purchase "Case Ready" meat products (the "Purchase Agreement"). (The Lease Agreement and the Purchase Agreement are collectively referred to here as the "Agreements.") Under the Purchase Agreement, Case Ready meat products are cut, packaged, and shipped by Swift to Alex Lee or Alex Lee's customers from the Lenoir Plant.

After the parties began performing under the Agreements, a dispute arose between them. Alex Lee now alleges that Swift's performance under the Purchase Agreement was "deficient" and attempts to assert five causes of action based on Swift's purportedly deficient performance: (1) breach of the Lease Agreement; (2) breach of the Purchase Agreement; (3) violations of the North Carolina Unfair and Deceptive Trade Practices Act ("UDTPA"); (4) conversion; and (5) fraud.

Although Swift denies that it breached the Lease Agreement or the Purchase Agreement, denies that Alex Lee is entitled to any recovery under Alex Lee's two purported contract claims, and reserves the right to defend against those purported claims, the focus of this Partial Motion to Dismiss is Alex Lee's remaining purported UDTPA, conversion, and fraud claims.[1] As will be demonstrated below, the Court should dismiss with prejudice these contract-centered causes of action for numerous reasons:

- The purported UDTPA claim should be dismissed with prejudice because the issues in this case revolve entirely around a contract dispute over Swift's allegedly "deficient" performance under the Purchase Agreement, and Alex Lee fails to plead facts showing "substantial aggravating circumstances" necessary to maintain a viable UDTPA claim.

- The Court should dismiss Alex Lee's conversion claim for several reasons. **First**, the claim fails because the Purchase Agreement, which is attached to and referred to by the Counterclaims, establishes that the allegedly converted property was owned by Swift, rather than Alex Lee, at the time of the purported conversion. **Second**, to the extent the cause of action is for the conversion of money, Alex Lee fails to allege that the money at issue was identifiable and described as a specific chattel. **Third**, Alex Lee fails to allege facts showing that Alex Lee demanded the return of any personal property and that Swift refused Alex Lee's demand.

- The Court should dismiss Alex Lee's fraud claim for several reasons. **First**, Alex Lee has failed to plead the claim with particularity by alleging the time, place, and

[1] After the Court rules on Swift's Partial Motion to Dismiss, Swift will answer both of Alex Lee's purported breach of contract claims. *See Justice v. Dimon*, No. 3:10cv413, 2011 WL 2183146, at *2 (W.D.N.C. June 6, 2011) (Cogburn, J.) (holding that rules of civil procedure permit a defendant to file a motion to dismiss fewer than all claims and await a court ruling on the motion before filing an answer to the remaining claims).

contents of the alleged false representations, as well as the identity of the person making the misrepresentations and what he obtained. **Second**, Alex Lee has failed to plead facts showing that Swift possessed the requisite intent to deceive at the time Swift made the promises upon which Alex Lee attempts to base its purported fraud claim. **Third**, Alex Lee fails to show facts demonstrating that Swift's alleged misrepresentations or concealments proximately caused Alex Lee to sustain an injury.

ALEX LEE'S ALLEGATIONS

The parties are sophisticated companies operating in the food industry. Alex Lee is a food retail and distribution company located in North Carolina and Swift is a meat processing company headquartered in Greeley, Colorado. (*See* ECF No. 26 ("Counterclaims") ¶¶ 1, 3.)

In 2014, the parties entered into a ten-year Lease Agreement, under which Swift would lease the Lenoir Plant from Alex Lee. (*Id.* at ¶¶ 4, 8.) On the same day, the parties also entered into a Purchase Agreement under "which Alex Lee would purchase certain meat products produced by Swift at the [Lenoir] Plant." (*Id.* at ¶ 9.) As will be demonstrated below, it is Swift's allegedly deficient performance under the Purchase Agreement that is at the core of Alex Lee's Counterclaims. (*Id.* at § B. ("Swift Beef's Deficient Performance Under the Purchase Agreement").)

I. The thrust of Alex Lee's complaints is that Swift allegedly failed to perform under the Purchase Agreement.

The "Facts" section of Alex Lee's Counterclaims is organized into four subparts. The first subpart identifies the Agreements and is comprised of 11 paragraphs, nearly all of which describe and discuss the Purchase Agreement. (*See id.* at ¶¶ 8-18.)

The second subpart of the "Facts" section, which spans over eight pages of the Counterclaims, is entitled "Swift Beef's Deficient Performance under the Purchase Agreement." (*Id*. at ¶¶ 19-64.) Within this subpart, Alex Lee compartmentalizes its allegations into three distinct subsections as follows:

- "Swift Beef's Failure to Meet Industry Service Level Standards" (*Id.* at ¶¶ 21-29);
- "Swift Beef's Failure to Meet its Contractual Obligations Regarding Cost of Goods" (*Id.* at ¶¶ 30-55); and
- "Swift Beef's Failure to Meet Quality and Safety Requirements." (*Id.* at ¶¶ 56-64.)

Each of the above subsections includes allegations that Swift purportedly failed to perform obligations under the Purchase Agreement. For instance, in the first subsection, entitled "Swift Beef's Failure to Meet Industry Service Level Standards," Alex Lee contends that Swift failed to satisfy the Purchase Agreement's "core requirement" to "use commercially reasonable efforts to produce" meat products "efficiently" and to "use its best efforts to fill timely all orders as requested" by Alex Lee. (*Id.* at ¶ 21.) According to Alex Lee, this failure is demonstrated by Swift's alleged inability to meet generally accepted industry service level standards for its operations at the Lenoir Plant. Alex Lee contends that, "[s]ervice levels in the meat production industry are generally expected to exceed 98 percent on a daily basis" and that Swift failed to satisfy these service levels on certain dates in June 2017 and July 3, 2017. (*Id.* at ¶¶ 23-26.) Alex Lee concludes that the aforementioned acts and/or omissions allegedly committed by Swift and identified in the first subsection constitute a breach of the Purchase Agreement:

> 29. Swift Beef's inability to meet—or even approach—industry service level standards *amounts to a breach of Swift Beef's core obligations under Sections 3 and 4 of the Purchase Agreement* to "use commercially reasonable efforts to produce the Product efficiently," and to "use its best efforts to fill timely all orders as requested by [Alex Lee]."

(*Id.* at ¶ 29 (emphasis added).)

Similarly, in the second subsection, entitled "Swift Beef's Failure to Meet its Contractual Obligations Regarding Cost of Goods," Alex Lee alleges that: (1) Swift misallocated labor costs to Alex Lee that should have been allocated to another customer serviced by Swift from the Lenoir

Plant—that is, Food Lion (*id.* at ¶¶ 30-39); (2) Swift gave its "business relationship with Food Lion priority over the relationship with Alex Lee" (*id.* at ¶¶ 40-41); (3) Swift "improperly increased Alex Lee's cost of goods by mismanaging inventory and supplies," which includes selling "some of Alex Lee's ostensibly obsolete supplies" while failing to "credit Alex Lee with the amount received from that sale" (*id.* at ¶¶ 43-49); (4) Swift "improperly charged Alex Lee for excessive supplies because a problem with Swift Beef's equipment required that certain product be rewrapped" (*id.* at ¶ 50); and (5) Swift's "inefficient management of the [Lenoir] Plant increased the cost of meat products produced in the Plant to the point that they became uncompetitive, and Alex Lee was required to begin sourcing product that should have been produced at the Plant in Lenoir from other parts of the country." (*Id.* at ¶¶ 51-54.) In the concluding paragraph of this subsection, Alex Lee asserts that the aforementioned acts and/or omissions committed by Swift constitute a breach of the Purchase Agreement:

> 55. By improperly increasing Alex Lee's costs of goods, Swift Beef *has violated Section 3 and Exhibit C of the Purchase Agreement*, which set out the costs that Swift Beef is legally permitted to charge Alex Lee and require Swift Beef to use "commercially reasonable efforts to produce the Product efficiently and at competitive cost."

(*Id.* at ¶ 55 (emphasis added).)

The last subsection, which relates to Swift's alleged failure to meet quality and safety requirements, includes various accusations that Swift has "also failed to deliver product to Alex Lee meeting the quality and safety requirements *set out in the Purchase Agreement*." (*Id.* at ¶ 56) (emphasis added). For instance, Alex Lee contends that it "received approximately 30 complaints per week from stores" that Swift shipped ground beef in vacuum sealed packages that failed, "causing the meat to turn brown within 24 hours." (*Id.* at ¶¶ 59-60.) Alex Lee also alleges that it received "at least eleven complaints from customers who found bone fragments in sausage

produced by Swift" at the Lenoir Plant. (*Id.* at ¶ 61.) Additionally, Alex Lee avers that Swift "*breached the Purchase Agreement* by delivering injected pork to Lowes retail stores." (*Id.* at ¶ 62 (emphasis added).) As with the other subsections, Alex Lee concludes this subsection by asserting that Swift's conduct constitutes a breach of the Purchase Agreement:

> 63. The persistent issues with the quality and safety of product produced by Swift Beef at the Plant *amount to a breach of Swift Beef's obligations under Section 5 of the Purchase Agreement* to "use its best efforts to product [sic] Product consistent with the specifications set out in Exhibit A or as otherwise agreed by the Parties," and to "meet or exceed . . . U.S. Agricultural Marketing Services regulations governing the sale of meat" and "Current Good Manufacturing Process standards."
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> 64. The product provided by Swift Beef also *fails to satisfy Swift Beef's obligation under Section 3 of the Purchase Agreement* to "use commercially reasonable efforts to produce the Product efficiently and at competitive cost."

(*Id.* at ¶¶ 63-64) (emphasis added).)

After identifying all of the facts that Alex Lee contends demonstrate "Swift Beef's Deficient Performance under the Purchase Agreement" in the second subpart of the "Facts" section of the Counterclaims, Alex Lee uses the remaining subparts to discuss Alex Lee's alleged attempt to resolve "problems" with Swift "without litigation" (*id.* at ¶¶ 65-78), and to make impertinent, immaterial, and scandalous allegations in the final subpart concerning conduct allegedly engaged in by two individuals in Brazil who are not connected to the Agreements, the Lenoir Plant, Swift's performance under the Agreements, or the causes of action purportedly pleaded in the Counterclaims.[2]

[2] Swift is filing a separate Rule 12(f) motion to strike the allegations in paragraphs 79-86 of the Counterclaims and Exhibit F to the Counterclaims.

II. Alex Lee's causes of action revolve around Swift's supposedly deficient performance under the Purchase Agreement.

Alex Lee's Counterclaims purport to assert five causes of action: (1) breach of the Lease Agreement; (2) breach of the Purchase Agreement; (3) conversion; (4) fraud; and (5) violations of the UDTPA. (*Id.* at ¶¶ 87-122.) Alex Lee's purported UDTPA, conversion, and fraud claims all involve Swift's understanding of, and performance under, the Purchase Agreement. (*Id.* at ¶¶ 8-64, 100-122.) Furthermore, the conduct allegedly committed by Swift upon which these claims are purportedly based occurred during the course of Swift's performance of the Purchase Agreement. (*Id.*)

ARGUMENT

I. Standard of Decision

To survive a Rule 12(b)(6) motion, the complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* When evaluating whether the complaint states a claim that is plausible on its face, the facts are construed in the light most favorable to the plaintiff and all reasonable inferences are drawn in its favor. *U.S. ex rel. Oberg v. Pa. Higher Educ. Assistance Agency*, 745 F.3d 131, 136 (4th Cir. 2014). Nevertheless, "labels and conclusions[,]" "a formulaic recitation of the elements of a cause of action [,]" and "naked assertions . . . without some further factual enhancement" are insufficient. *Twombly*, 550 U.S. at 557; *see also Massey v. Ojaniit*, 759 F.3d 343, 353 (4th Cir. 2014) (noting that the Court is not obligated to accept allegations that are " 'unwarranted inferences, unreasonable conclusions, or arguments' " or " 'that contradict matters properly subject to judicial

notice or by exhibit' " (quoting *Blankenship v. Manchin*, 471 F.3d 523, 529 (4th Cir. 2006)).

II. Given the contractual center of the dispute, Alex Lee's purported UDTPA claim is barred.

To state a claim under the UDTPA, a plaintiff must allege facts showing the existence of three elements: "(1) the defendant committed an unfair act or deceptive trade practice; (2) the action in question was in or affecting commerce; and (3) the act proximately caused injury to the plaintiff." *Bob Timberlake Collection, Inc. v. Edwards*, 176 N.C. App. 33, 41, 626 S.E.2d 315, 322, *disc. review denied*, 360 N.C. 531, 633 S.E.2d 674 (2006). "Whether an act or practice is unfair or deceptive is a question of law for the court." *DiFrega v. Pugliese*, 164 N.C. App. 499, 507, 596 S.E.2d 456, 462 (2004). What constitutes an unfair or deceptive trade practice or act "is a somewhat nebulous concept" that depends on the circumstances of the particular case. *Gilbane Bldg. Co. v. Fed. Reserve Bank of Richmond*, 80 F.3d 895, 902 (4th Cir. 1996). Nevertheless, it is clear that "only practices that involve '[s]ome type of egregious or aggravating circumstances' are sufficient to violate the . . . [UDTPA]." *S. Atl. Ltd. P'ship of Tenn. v. Riese*, 284 F.3d 518, 535 (4th Cir. 2001) (*quoting Dalton v. Camp*, 353 N.C. 647, 548 S.E.2d 704, 711 (2001)). An act or practice is considered unfair if it is "immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Bob Timberlake*, 176 N.C. App. at 41, 626 S.E.2d at 322-23. "An act or practice is deceptive if it has the capacity or tendency to deceive." *Id.* at 41, 626 S.E.2d at 323.

"[B]ecause '[p]roof of unfair or deceptive trade practices entitles a plaintiff to treble damages,' a . . . [UDTPA] count 'constitutes a boilerplate claim in most every complaint based on a commercial or consumer transaction in North Carolina.' " *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 347 (4th Cir. 1998) (quoting *Allied Distributors, Inc. v. Latrobe Brewing Co.*, 847 F. Supp. 376, 379 (E.D.N.C. 1993)). "To correct this tendency, and to keep control of the extraordinary damages authorized by the . . . [UDTPA], North Carolina courts have

repeatedly held that 'a mere breach of contract, even if intentional, is not sufficiently unfair or deceptive to sustain an action under . . . [the UDTPA].' " *Id.* (collecting cases). In fact, "[i]t is well recognized . . . that actions for unfair or deceptive trade practices are distinct from actions for breach of contract . . . ." *Bob Timberlake*, 176 N.C. App. at 42, 626 S.E.2d at 323. This is true because "[i]t is unlikely that an independent tort could arise in the course of contractual performance, since those sorts of claims are most appropriately addressed by asking simply whether a party adequately fulfilled its contractual obligations." *Bob Timberlake*, 176 N.C. App. at 42, 626 S.E.2d at 323; *Eastover Ridge, LLC v. Metric Constructors, Inc.*, 139 N.C. App. 360, 368, 533 S.E.2d 827, 833, *disc. review denied*, 353 N.C. 262, 546 S.E.2d 93 (2000); *PCS Phosphate Co. v. Norfolk S. Corp.*, 559 F.3d 212, 224 (4th Cir. 2009).

As the foregoing discussion suggests, "North Carolina courts are extremely hesitant to allow plaintiffs to attempt to manufacture a tort action and alleged UDTP out of facts that are properly alleged as a breach of contract claim." *Birtha v. Stonemor, North Carolina, LLC*, 220 N.C. App. 286, 298, 727 S.E.2d 1, 10, (2012), *disc. review denied*, 366 N.C. 570, 738 S.E.2d 373 (2013). Thus, even assuming a party can establish the other elements of a UDTPA claim in the context of a contractual relationship, "[t]o recover for unfair and deceptive trade practices, a party must show substantial aggravating circumstances attending the breach of contract." *Bob Timberlake*, 176 N.C. App. at 42, 626 S.E.2d at 323; *see Eastover Ridge*, 139 N.C. App. at 367-68, 533 S.E.2d at 832-33; *Computer Decisions, Inc. v. Rouse Office Mgmt.*, 124 N.C. App. 383, 390, 477 S.E.2d 262, 266 (1996), *disc. review denied*, 345 N.C. 340, 483 S.E.2d 163 (1997). And "North Carolina courts routinely dismiss UDTPA claims asserted in simple breach of contract cases." *Harty v. Underhill*, 211 N.C. App. 546, 554, 710 S.E.2d 327, 333 (2011).

Swift denies that it has breached any contract with Alex Lee. Nevertheless, Alex Lee's

allegations show that, notwithstanding the law discussed above, Alex Lee is trying to transform breach-of-contract allegations into a UDTPA claim.

First, Alex Lee alleges that Swift passed along labor costs to Alex Lee that Alex Lee claims should have been charged to other Swift customers and that Swift failed to provide sufficient information to Alex Lee concerning those costs. (Counterclaims ¶ 118(a) & (b).) But, according to Alex Lee, those matters arise out of and are governed by contract: Alex Lee alleges that, "Section 3 and Exhibit C of the Purchase Agreement . . . set out the costs that Swift Beef is legally permitted to charge Alex Lee." (*Id.* ¶ 55; *see also id.* ¶ 39 (alleging that Swift's calculation of costs was "a direct violation of Section 3 and Exhibit C of the Purchase Agreement").) And Alex Lee specifically characterizes Swift Beef's purported actions related to costs as "Swift Beef's Failure to Meet its Contractual Obligations Regarding Costs of Goods." (*Id.* at 16, § 2.)

Second, Alex Lee alleges Swift mismanaged the Lenoir Plant, which allegedly resulted in Alex Lee's supply inventory being rendered obsolete. (*Id.* ¶ 118(c).) Alex Lee specifically claims that the "only reason the supply inventory was ostensibly obsolete was that Swift Beef had allowed the equipment for which the inventory was designed to fall into disrepair." (*Id.* ¶ 47.) But such alleged conduct is a far cry from an act that can be considered "immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers."

Third, Alex Lee claims that Swift sold a portion of Alex Lee's supply inventory without notifying Alex Lee of the sale or crediting Alex Lee with the proceeds of the sale. (*Id.* ¶ 118(c).) As will be shown below, however, under the Purchase Agreement, the products at issue were not owned by Alex Lee at the time they were allegedly sold. But, to the extent there was some alleged issue with accounting related to the sale of inventory under a Purchase Agreement that, as its name

reflects, specifically governs the purchase and sale of products, the issue would be a purely contractual one.

In short, none of Alex Lee's allegations is sufficient to remove its purported claims from the exclusive realm of contract law. Instead, the allegations involve only the parties' understanding of, and performance under, the Agreements. *See, e.g.*, *PCS Phosphate Co., Inc.*, 559 F.3d at 224 (holding that a railroad's threats to abandon line going to mine did not constitute "substantial aggravating circumstances" because they involved a dispute over obligations under the contract between the parties); *Canady v. Crestar Mortg. Corp.*, 109 F.3d 969, 975 (4th Cir. 1997) (noting that even an intentional breach is not sufficient for liability to attach under the UDTPA). In fact, the section of the Counterclaims in which Alex Lee discusses each of the issues outlined above is entitled, "Swift Beef's Deficient Performance Under the Purchase Agreement." (Counterclaims at 14, § B.)

Because Alex Lee's purported UDTPA claim is based upon Swift's performance of the Purchase Agreement and fails to allege facts showing substantial aggravating circumstances attending Swift's purported breach of that agreement, the Court should dismiss the purported claim with prejudice. *See Broussard*, 155 F.3d at 346-47; *M.J. Woods, Inc. v. Little Rapids Corp.*, No. 1:16-cv-00356, 2016 WL 7494469, at * 2-3 (W.D.N.C. Dec. 30, 2016) (dismissing UDTPA claims where plaintiff failed to show substantial aggravating circumstances attending the breach of the parties' agreement).

III. Alex Lee has not sufficiently pleaded facts demonstrating a claim for conversion.

A. Elements of a Conversion Claim

In North Carolina, conversion is generally defined as "an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the

alteration of their condition or the exclusion of an owner's rights." *Peed v. Burleson's, Inc.*, 244 N.C. 437, 94 S.E.2d 351, 353 (1956).

Here, Alex Lee's conversion claim is based on its assertion that,

> Swift Beef had actually *sold* some of Alex Lee's ostensibly obsolete supplies, but did not credit Alex Lee with the amount received from that sale. Swift Beef thus profited from the sale of Alex Lee's aged supplies, but still charged Alex Lee the full amount—$45,916.26—for the ostensibly obsolete supplies.

(Counterclaims ¶ 48 (emphasis in original); *see also id.* ¶ 102 (purporting to base conversion claim on Swift Beef's "selling supply inventory belonging to Alex Lee and failing to disburse or provide Alex Lee with a credit for the proceeds of the sale".)

B. To the extent it is based on Swift's alleged retention or sale of certain property, Alex Lee's purported conversion claim fails because the Purchase Agreement shows that the property was not owned by Alex Lee.

To the extent Alex Lee's purported conversion cause of action is based on "obsolete supplies," the claim fails because it is contradicted by the express terms of the Purchase Agreement attached to the Counterclaims as Exhibit B, which show that the products belong to and are supplied by Swift. (Ex. B (ECF No. 26-3) at 2.) For instance, the Purchase Agreement states, in relevant part, as follows:

> **WHEREAS**, As a condition for [Alex Lee's] agreement to Lease the Property to [Swift], [Swift] has agreed to *supply the products* indicated on **Exhibit A** attached hereto and incorporated herein ("Products") which are *produced* by [Swift] on the Property; and
>
> **WHEREAS**, [Alex Lee] desires to purchase from [Swift] and [Swift] desires to sell [Alex Lee] the Products on the terms and conditions set forth herein.
>
> *** * ***
>
> **2. PRODUCTS.** During the term of this Agreement, [Swift] agrees to sell, and [Alex Lee] agrees to purchase, the Products pursuant to the terms and conditions of this Agreement. Products purchased by [Alex Lee] hereunder may only be purchased for the purpose of supplying [Alex Lee] and [Alex Lee's] customers, all of

> which are listed on the **Exhibit B** attached hereto and incorporated herein (the "Approved Customers").

(*Id.*) Because the Purchase Agreement contradicts Alex Lee's allegations relating to the ownership of the supply inventory that was allegedly sold by Swift to a third-party, the Court is not obligated to accept Alex Lee's allegations and may dismiss the conversion claim. *See* Massey, 759 F.3d at 353 (noting that a district court is not obligated to accept allegations that are " 'unwarranted inferences, unreasonable conclusions, or arguments' " or " 'that contradict matters properly subject to judicial notice or by exhibit' " (quoting *Blankenship*, 471 F.3d at 529)).

C. To the extent it is based on Swift's alleged retention of money, Alex Lee's purported conversion claim fails because Alex Lee has not alleged facts showing that the funds were segregated from other funds and not commingled.

When a conversion claim is based on the conversion of money, that money must be identifiable and described as a specific chattel. *Alderman v. Inmar Enter., Inc.*, 201 F. Supp. 2d 532, 548 (M.D.N.C. 2002), *aff'd per curiam*, 58 F. App'x 47 (4th Cir. Feb. 27, 2003). "Money must be segregated from other funds or kept in a separate bank account and not commingled with the alleged converter's other funds." *Id.* To the extent Alex Lee's conversion claim is based on the purported conversion of money, the claim fails because the Counterclaims do not allege facts showing that the funds at issue were to have been segregated from other funds or kept in a separate bank account and not commingled with Swift's other funds.

D. Because Alex Lee has failed to allege facts showing that it demanded the return of the allegedly converted property, Alex Lee's purported conversion claim fails.

Where a defendant receives the chattel under a contract, there is no conversion until the defendant makes an absolute, unqualified refusal to surrender the chattel. *TSC Research, LLC v. Bayer Chemicals Corp.*, 552 F. Supp. 2d 534, 542 (M.D.N.C. 2008); *ACS Partners, LLC v. Americon Group, Inc.*, No. 3:09cv464, 2010 WL 883663, at * 11 (W.D.N.C. Mar. 5, 2010).

In this case, Alex Lee's allegations assert that Swift purportedly received the supplies and the money at issue pursuant to the Purchase Agreement with Alex Lee. (Counterclaim ¶¶ 48-49, 100-105.) But Alex Lee does not, and indeed cannot, allege that it demanded the return of either the products or money. That is because Alex Lee alleges that the supply inventory that forms the basis of its conversion claim was sold sometime around January 2016 without Alex Lee making any demand for possession of the property. (*Id.* at ¶ 44.) Instead, Alex Lee admits that Swift was permitted to sell the supply inventory, but contends Swift failed to comply with Alex Lee's "request that the parties work together to effectuate the sale of those supplies." (*Id.* at ¶ 46.) That admission is fatal to Alex Lee's claim for conversion. *TSC Research*, 552 F. Supp. 2d at 542 ("Plaintiff's amended complaint contains no allegation that Plaintiff demanded the return of its documents or other proprietary information, let alone an allegation that Defendants refused such a demand. As such, Plaintiff's conversion claim is deficient on its face for failing to allege an essential element."). Thus, Alex Lee's failure to allege demand and refusal renders its conversion claim deficient as a matter of law and the Court should dismiss the claim.

IV. The Court should dismiss Alex Lee's purported fraud claim.

A. Elements of a Fraud Claim.

To state a claim for fraud, a plaintiff must allege facts that show the existence of the following six elements:

> (1) material misrepresentation of a past or existing fact; (2) the representation must be definite and specific; (3) made with knowledge of its falsity or in culpable ignorance of its truth; (4) that the misrepresentation was made with intention that it should be acted upon; (5) that the recipient of the misrepresentation reasonably relied upon it and acted upon it; . . . (6) . . . result[ing] in damage to the injured party.

Hudson-Cole Dev. Corp. v. Beemer, 132 N.C. App. 341, 346, 511 S.E.2d 309, 312-13 (1999).

B. Alex Lee has failed to plead fraud with the particularity required by Fed. R. Civ. P. 9(b).

Rule 9(b) requires that, "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Fed. R. Civ. P. 9(b). That means that a plaintiff must allege, "at a minimum[,] . . . the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby." *U.S. ex rel. Wilson v. Kellog, Brown & Root, Inc.*, 525 F.3d 370, 379 (4th Cir. 2008); *see Ingersoll v. Life Indus. Corp.*, 698 F. Supp. 2d 552, 444 (E.D.N.C. 2010); *Majeed v. North Carolina*, 520 F. Supp. 2d 720, 723-24 (E.D.N.C. 2007). As the Fourth Circuit has observed, "[t]hese facts are often referred to as the 'who, what, when, where, and how' of the alleged fraud." *Wilson*, 525 F.3d at 379.

Here, Alex Lee's Counterclaims do not specifically identify who at Swift made any alleged false representations, the content of those representations, when the representations were made, or where they were made. Rather than identifying who at Swift made any supposedly false representations, when or where the representations were made, or the contents of those representations, Alex Lee attempts to rely on documents attached to its Counterclaims as Exhibit C. Those documents include an undated report containing Alex Lee's own representations to Swift regarding an internal audit Alex Lee allegedly performed. (*See id.* at ¶ 32; ECF No. 26-4 at 2-6.) The report's discussion of an alleged plot to "falsify labor records" is vague and ambiguous. (*See generally* ECF No. 26-4 at 2-6.) There is no discussion of what records were falsified, what information was falsified, the content of the false information, the breadth and scope of the falsified information, or what was obtained as a result of the fraudulent acts or representations. Moreover, Alex Lee's claim is based in part on what it alleges were "inexplicable variances in labor costs allocated to Alex Lee." (Counterclaims ¶ 37.) Yet, Alex Lee's own report

actually includes facts showing that at least ten other reasonable explanations exist for any increased negative labor variances at the Lenoir Plant. (*Id*. at 5.) The inclusion of this information defeats the fraud claim.

Exhibit C also includes emails sent to Alex Lee by two disgruntled former Swift employees. (*Id.* at ¶ 31; *see also* ECF No. 26-4 at 7-10.) But the emails from these *former* employees with an axe to grind do not include the particularities necessary for Alex Lee to plead a fraud claim—which is why Alex Lee does not include those particularities in its Counterclaims.

Alex Lee's attempt to circumvent its obligation to allege facts with particularity in order to support a viable fraud claim by relying on a report and emails that, when considered individually or collectively, do not pass muster under Rule 9(b) should lead to the dismissal of the claim.

C. Alex Lee has failed to plead facts showing that Swift had the requisite intent not to fulfill its contractual promises at the time Swift made those promises.

"The mere failure to carry out a promise in contract . . . does not support a tort action for fraud." *Strum v. Exxon Co., U.S.A.*, 15 F.3d 327, 331 (4th Cir. 1994); *Carolina Power & Light Co. v. Aspect Software, Inc.*, No. 5:08-CV-00449BO, 2009 WL 256332, at *2 (E.D.N.C. Feb. 3, 2009); *Norman v. Tradewinds Airlines, Inc.*, 286 F. Supp. 2d 575, 594 (M.D.N.C. 2003). Instead, "[a]n unfulfilled promise is not actionable fraud . . . unless the promisor had no intention of carrying it out at the time of the promise, since this is a misrepresentation of a material fact." *McKinnon v. CV Indus., Inc.*, 213 N.C. App. 328, 338, 713 S.E.2d 495, 503 (emphasis added), *disc. review denied*, 365 N.C. 353, 718 S.E.2d 376 (2011); *see also Wellness Group, LLC v. King Bio, Inc.*, No. 1:12-cv-00281, 2014 WL 1632930, at *4 (W.D.N.C. Apr. 24, 2014); *Mesimer v. Stancil*, 52 N.C. App. 361, 363, 278 S.E.2d 530, 532 (1981).

When determining whether "the promisor had a 'specific intent' not to perform at the time a promise was made . . . . [m]ere generalities and conclusory allegations will not suffice to sustain

a fraud claim." *Norman*, 286 F. Supp. 2d at 594 (quoting *Strum*, 15 F.3d at 331). Likewise, "the mere fact that the Defendants ultimately failed to fulfill the promises they made to Plaintiffs does not raise the inference that these promises were made 'with the intent to defraud.'" *Carolina*, 2009 WL 256332, at *3. Thus, "where a plaintiff does 'nothing more than assert that [a promisor] never intended to honor its obligations under [an] agreement,' dismissal as a matter of law is appropriate." *Norman*, 286 F. Supp. 2d at 594 (quoting *Strum*, 15 F.3d at 331); *see Carolina*, 2009 WL 256332, at *2.

Distilled to its essence, Alex Lee's purported fraud claim alleges that Swift committed fraud by charging Alex Lee costs "that were not permitted by the Purchase Agreement." (Counterclaims ¶ 109; *see also id.* ¶ 108 ("Swift Beef intentionally and knowingly carried out a fraudulent scheme against Alex Lee by which labor costs that should have been allocated to Food Lion were instead charged to Alex Lee"); *id.* ¶ 109 ("By charging Alex Lee with costs that should have been charged to Food Lion, Swift Beef repeatedly falsely represented and/or concealed material facts from Alex Lee . . . .")).[3] According to Alex Lee, Swift promised to charge Alex Lee only the costs itemized in Section 3 and Exhibit C of the Purchase Agreement. (*Id.* ¶¶ 39, 55.) But the Counterclaims are devoid of any allegation that, at the time that it allegedly made a promise to charge only those costs listed in the Purchase Agreement—i.e., at the time the Purchase Agreement was executed—Swift did not intend to comply with that promise and instead intended to charge other costs to Alex Lee. Thus, Alex Lee fails to state a claim for fraud against Swift.

[3] Alex Lee also suggests that Swift somehow concealed that it was allegedly "prioritizing its service levels for Food Lion, as well as other aspects of its relationship with Food Lion, over Swift Beef's relationship with Alex Lee." (Counterclaims ¶ 109(c)). Nothing in the Agreements requires that Swift produce product only for Alex Lee or disclose to Alex Lee "the prioritization of its service levels" or "other aspects of its relationship" with other customers. In the absence of facts showing a duty of disclosure, however, a fraudulent concealment claim fails. *Computer Decisions, Inc. v. Rouse Office Mgmt. of N.C., Inc.*, 124 N.C. App. 383, 389, 477 S.E.2d 262, 265 (1996), *disc. review denied*, 345 N.C. 340, 483 S.E.2d 163 (1997), and no such facts are alleged in this case.

Furthermore, the Counterclaims do not allege that Swift failed to perform every obligation in the contract. This is significant, because the fact Swift was performing under the Purchase Agreement alone defeats Alex Lee's purported fraud claim. *See Wellness*, 2014 WL 1632930, at *4 ("A defendant's partial performance under a contract is evidence of the defendant's intent to fulfill the agreement when formed."). Courts have consistently dismissed fraud claims premised on the failure to fulfill some contractual promises where the defendant has performed other promises. *See, e.g., id.; McKinnon*, 213 N.C. App. at 339-40, 713 S.E.2d at 504; *Mesimer*, 52 N.C. App. at 363-64, 278 S.E.2d at 532. While Alex Lee may now claim that it was not happy with Swift's performance, it cannot and does not claim that Swift completely failed to perform. Indeed, Alex Lee's allegations reveal that Swift did perform, even if allegedly not to Alex Lee's satisfaction. (Counterclaims ¶¶ 25, 26, 27, 68.) Thus, Alex Lee's fraud claim should be dismissed.

D. Alex Lee has failed to plead facts showing that Alex Lee reasonably relied on any alleged fraudulent misrepresentation or concealment or that any such misrepresentation or concealment proximately caused Alex Lee to sustain an actual injury.

Alex Lee's fraud claim also fails because Alex Lee's allegations show that it did not reasonably rely on any misrepresentations or concealments allegedly made by Swift. Reasonable reliance is an essential element of fraud. *Hudson-Cole*, 132 N.C. App. at 346, 511 S.E.2d at 312-13. And a party cannot, as a matter of law, rely on something that he or she knows is false. *Cox v. Johnson*, 227 N.C. 69, 70, 40 S.E.2d 418, 419 (1946) ("The law will not permit one to predicate an action for fraud upon a representation which he knows to be false, for he cannot be deceived by that which he knows.").

Alex Lee claims that it "relied on the truth of the representations and/or omissions listed above and the other false representations and omissions made by Swift Beef in continuing its contractual relationship with Swift Beef." (Counterclaims ¶ 114.) But other allegations in the

Counterclaims and documents attached to Alex Lee's Counterclaims undercut these assertions. Specifically, Exhibit C to the Counterclaims shows that Alex Lee conducted an investigation into Swift's alleged fraud *in January 2016*, when Alex Lee allegedly received e-mails from disgruntled former Swift Beef employees.[4] (*See generally* ECF No. 26-4.) These materials thus show that Alex Lee knew, no later than January 2016, about the "facts" that it now contends support its purported fraud claim—i.e., supposed fraudulent billing and alleged improper prioritization of Food Lion's business. Nevertheless, Alex Lee waited until *July 2017* to try to end the parties' relationship. (*Id.* ¶ 70.) Alex Lee asserts that it continued the parties' relationship even though, after it conducted its investigation into Swift's purported fraud, it "contacted Swift Beef to express its concerns regarding the information learned from Swift Beef's former employees," but "did not receive a satisfactory response." (*Id.* ¶ 37.) And Alex Lee specifically concedes that, "[d]espite Swift Beef's numerous breaches of the Lease and the Purchase Agreement, Alex Lee did not immediately move to terminate either agreement." (*Id.* ¶ 65.) Thus, notwithstanding Alex Lee's conclusory allegations to the contrary, the factual allegations of Alex Lee's Counterclaims reveal that Alex Lee did not, in fact, rely—reasonably or otherwise—on Swift's purported misrepresentations and concealments in making the decision to continue the parties' relationship. Alex Lee similarly cannot claim that its decision to continue that relationship was proximately caused by any purported fraud. Instead, the Counterclaim alleges that the continuance of the relationship was due to Alex Lee's decision to try to work things out with Swift. (*Id.* ¶¶ 65-67, 71-72.) Thus, Alex Lee cannot state a cognizable fraud claim.

[4] Swift respectfully refers the Court to the January 2016 dates on the e-mails included in Exhibit C.

CONCLUSION

For all the reasons set forth above, Swift requests the Court to dismiss with prejudice Alex Lee's purported UDTPA, conversion, and fraud claims. Swift also requests such other and further relief to which it may be entitled both at law and/or equity.

Respectfully submitted this 12th day of December, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on December 12, 2017, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following: Mark W. Kinghorn, Esq. (mkinghorn@mcguirewoods.com).

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